

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 JAMES EDWARD CURTIS,

8 Plaintiff,

9 v.

10 LEATHERS (FNU), WASHINGTON  
11 DEPARTMENT OF CORRECTIONS,

12 Defendants.

Case No. 17-474 RAJ-BAT

**REPORT AND  
RECOMMENDATION**

13 Defendant Washington Department of Corrections (“DOC”) moves for dismissal of all  
14 claims against it pursuant to Fed. R. Civ. P. 12(b). Dkt. 15. Mr. Curtis did not file any papers in  
15 opposition to the motion. The Court recommends that Mr. Curtis’s complaint be dismissed with  
16 prejudice as to the DOC based on Eleventh Amendment immunity.

17 **PLAINTIFF’S CLAIMS**

18 Mr. Curtis is an inmate under the custody of the DOC. He filed this 42 U.S.C. § 1983  
19 action against one named Defendant, “Leathers (FNU)”, and the DOC. Dkt. 7. Mr. Curtis  
20 alleges that Defendants Leathers wrongfully rejected his incoming prison mail. *Id.*, p. 5. His  
21 claims against the DOC arise out of the Washington State Public Records Act, RCW 42.56 et  
22 seq. *Id.* Mr. Curtis asserts that this Court has jurisdiction over the state action under 28 U.S.C.  
23 §1367(a). *Id.* at 6.

The DOC waived service on June 5, 2017. Dkt. 11. Defendant “Leathers (FNU)” has not  
REPORT AND RECOMMENDATION - 1

1 been served in this matter. Counsel for the DOC advised that “Leathers (FNU)” is not a current  
2 Washington state employee, and that she moved out of state and may have changed her name.  
3 Dkt. 14. On July 17, 2017, based on information provided by the DOC to the Court under seal,  
4 the Court directed service of the summons and complaint on Jaclyn Jorgenson. Dkt. 19. On July  
5 31, 2017, the Court’s mail to Defendant Leathers, a/k/a Jaclyn Jorgenson was returned by the  
6 United States Post Office marked “Mail Returned as Undeliverable, Return to Sender, Attempted  
7 – Not Known Unable to Forward.” Dkt. 20. Under separate order, Mr. Curtis has been ordered  
8 to show cause why his claims against Defendant Leathers should not be dismissed without  
9 prejudice.

## 10 DISCUSSION

11 On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint  
12 contains “sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on  
13 its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550  
14 U.S. 544, 570 (2007)). Mere conclusory statements in a complaint and “formulaic recitation[s]  
15 of the elements of a cause of action” are not sufficient. *Twombly*, 550 U.S. at 555; *Chavez v.*  
16 *United States*, 683 F.3d 1102, 1108-09 (9<sup>th</sup> Cir. 2012).

17 “Under Ninth Circuit case law, district courts are only required to grant leave to amend if  
18 a complaint can possibly be saved. Courts are not required to grant leave to amend if a  
19 complaint lacks merit entirely.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir.2000). *See also*,  
20 *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1106 (9th Cir.2004), *citing*  
21 *Doe v. United States*, 58 F.3d 494, 497(9th Cir.1995) (“a district court should grant leave to  
22 amend even if no request to amend the pleading was made, unless it determines that the pleading  
23 could not be cured by the allegation of other facts.”)

1 “The Eleventh Amendment prohibits federal courts from hearing suits brought against an  
2 unconsenting state.” *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th  
3 Cir. 1991). The Eleventh Amendment bars suits against state agencies, as well as those where  
4 the state itself is named as a defendant. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy,*  
5 *Inc.*, 506 U.S. 139, 144 (1993); *see also Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.  
6 1995) (per curiam) (Board of Corrections is agency entitled to immunity); *Taylor v. List*, 880  
7 F.2d 1040, 1045 (9th Cir. 1989) (Nevada Department of Prisons is a state agency entitled to  
8 Eleventh Amendment immunity).

9 The State of Washington has not waived its Eleventh Amendment immunity to suit. *See*  
10 *e.g., Rains v. State*, 100 Wn.2d 660, 666, 674 P.2d 165 (1983) (state has not waived its immunity  
11 from suits brought under 42 U.S.C. § 1983) (citing *Peters v. Lieuallen*, 693 F.2d 966, 970 (9th  
12 Cir. 1982)); *Edgar v. State*, 92 Wn.2d 217, 221, 595 P.2d 534 (1979), *cert. denied*, 444 U.S.  
13 1077. The DOC is an agency of the State of Washington and has not waived its Eleventh  
14 Amendment immunity. It is therefore presumptively immune from suit in federal court under the  
15 Eleventh Amendment.

16 Mr. Curtis relies on 28 U.S.C. § 1367(a), which confers supplemental jurisdiction over  
17 claims for which the district court does not have original jurisdiction but “are so related to claims  
18 in the action within such original jurisdiction that they form part of the same case or controversy  
19 under Article III of the United States Constitution.” However, courts have consistently held that  
20 this statute does not abrogate the State’s Eleventh Amendment immunity. *Raygor v. Regents of*  
21 *the University of Minnesota*, 534 U.S. 533, 541-42 (2002) (“[W]e cannot read § 1367(a) to  
22 authorize district courts to exercise jurisdiction over claims against nonconsenting States, even  
23 though nothing in the statute expressly excludes such claims.”). *See also Stanley v. Trustees of*

1 *California State University*, 433 F.3d 1129, 1133-34 (9th Cir. 2006) (“Thus, we hold that 28  
2 U.S.C. § 1367 does not abrogate state sovereign immunity for supplemental state law claims”),  
3 *and see Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (broad grant of jurisdiction  
4 over all civil actions in 28 U.S.C. § 1362 does not abrogate state’s Eleventh Amendment  
5 immunity).

6 The DOC contests that the facts are part of the same case and controversy sufficient to  
7 warrant supplemental jurisdiction. Further, it argues that even if the facts were part of the same  
8 case and controversy, this claimed basis for jurisdiction is procedurally deficient because there is  
9 only one claim asserted against the State and thus, it is not a “supplemental” claim. The Court  
10 agrees. Mr. Curtis’s claim to supplemental jurisdiction under 28 U.S.C. § 1367(a) does not  
11 override the State’s Eleventh Amendment immunity and therefore, his claims against the DOC  
12 should be dismissed and this matter re-referred to the undersigned for further proceedings.

### 13 **OBJECTIONS AND APPEAL**

14 This Report and Recommendation is not an appealable order. Therefore a notice of  
15 appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
16 assigned District Judge enters a judgment in the case. Objections, however, may be filed and  
17 served upon all parties no later than **Tuesday, August 22, 2017**. The Clerk should note the  
18 matter for **Thursday, August 24, 2017**, as ready for the District Judge’s consideration if no  
19 objection is filed.

20 If objections are filed, any response is due within 14 days after being served with the  
21 objections. A party filing an objection must note the matter for the Court’s consideration 14  
22 days from the date the objection is filed and served. The matter will then be ready for the  
23 Court’s consideration on the date the response is due. Objections and responses shall not exceed

1 12 pages. The failure to timely object may affect the right to appeal.

2 DATED this 3rd day of August, 2017.

3 

4 BRIAN A. TSUCHIDA  
5 United States Magistrate Judge  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23